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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>CHARLES BYON NISHI,<br>Defendant and Appellant. | A154480<br><br>(Marin County<br>Super. Ct. No. SC195072) |

On November 24, 2015, appellant Charles Byon Nishi, was charged by the Marin County District Attorney with vandalism (Pen. Code, § 594, subd. (b)(1))[1] (count 1), depositing a hazardous substance (§ 374.8, subd. (a)) (count 2), and depositing an offensive substance, a misdemeanor (§ 375, subd. (a)) (count 3). On January 19, 2016, a jury found appellant guilty of all three offenses.

On March 19, 2018, more than two years later,[2] the court sentenced appellant to a prison term of three years and eight months, but ruled that the sentence was to be served

[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

[2] This extraordinary delay was the result of a variety of unusual postconviction events, most of which were precipitated by appellant.

After the jury returned its guilty verdict, the trial court granted appellant's appointed counsel's request to be relieved. Because the public defender had declared a conflict, the court appointed Morgan Daly for the purpose of filing a motion for a new trial. After Daly made the motion and it was denied, he successfully sought to be relieved as counsel. Appellant then unsuccessfully moved to represent himself, and the court appointed Ford Greene to represent him. However, on February 8, 2017, when appellant again sought leave to represent himself, the request was granted. Appellant

in the county jail pursuant to section 117, subdivision (h). For count 1, vandalism, the court imposed the aggravated term of three years, and on count 2, depositing a hazardous substance, a consecutive term of eight months. The court stayed sentence on count 3, depositing an offensive substance, a misdemeanor, pursuant to section 654.

Appellant's chief contention on this appeal is that his conviction of depositing a hazardous substance is unsupported by substantial evidence. However, he alternatively alleges that imposition of consecutive sentences for vandalism and depositing a hazardous substance violates section 654. Appellant also points out that the bases of the $500 fine and a $25 assessment imposed on him, which are collectively referred to in the abstract of judgment as a $525 "fine," were not specified in the abstract of judgment and this case must therefore be remanded to the trial court with directions to amend the abstract of judgment to specify the statutory or other basis for the $525 "fine."

The Attorney General contests appellant's chief claim but agrees that section 654 precludes a consecutive sentence of eight months for depositing a hazardous substance. Mindful that a statutory basis for each fine penalty assessment imposed must be specified in the abstract of judgment (*People v. Hamed* (2013) 221 Cal.App.4th 928, 940–941) and that this was not done in this case, the Attorney General also agrees that the abstract of judgment must be amended to provide this information.

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then requested postponement of entry of judgment and release from custody; both motions were denied. On June 7, 2017, appellant filed two *Pitchess* motions seeking files of Marin County and Novato law enforcement officers involved in the investigation of his case, and the motions were both denied on July 19, 2017. That same day, appellant petitioned for an order disclosing juror information. After the court denied the petition, appellant filed another motion for release from custody and notice of motion for court enforced discovery, which was partially granted. On November 3, 2017, after numerous continuances, appellant moved for a new trial, which the court denied on December 1, 2017.

As we later discuss, at the time appellant was sentenced, he had served more time in confinement than the term to which he had been sentenced. The remedy the court employed to rectify this problem (discussed, *post*, at pp. 12–13) warrants our attention, though it was never addressed by either party at any time.

We shall stay appellant's consecutive sentence for depositing hazardous substances and remand the matter to the trial court to make appropriate modifications in the abstract of judgment. In all other respects, we shall affirm the judgment.

***The Relevant Evidence Received by the Court***

Ely Bautista, who worked at the meat counter of the Harvest Market in Novato, which was near the main entrance to the market, had recently seen appellant in the store on several occasions and knew he was suspected by other employees of shoplifting. On October 24, 2015, the day before the charged offenses took place, Bautista saw appellant walk into the market carrying a brown bag, take an item from a shelf, put it in the bag, and walk out the door without paying. Bautista testified that two other employees who witnessed appellant's conduct, followed him outside and confronted him. Appellant responded to their efforts "aggressively."

Thomas Davis, who managed the Harvest Market, testified that during the weeks preceding the charged offenses, employees were aware appellant "regularly walked into the market, put [items] in a bag, and left without paying for anything." Davis, who had seen appellant in the store about a dozen times recently, told employees: "Hey, keep your eyes on this guy." On October 24, 2015, Davis was told by Bautista that other employees who had seen appellant take merchandise from the market were then confronting him as he was leaving the store. Davis went to the parking lot where the confrontation was taking place and observed that it was "escalating rapidly" and "getting out of hand." The police were contacted. Appellant was "very angry" and threatened the employees who were trying to detain him until the police arrived. Davis testified that when appellant tried to get on his bike to leave the scene, "one of my guys grabbed the bike and that's when [appellant] grabbed the bike and started swinging it over his head."

Shortly after appellant departed on his bicycle, the police showed up and Davis pointed them in the direction in which appellant went.

The following day, October 25, about 5:00 p.m. Bautista was working at the meat counter and saw appellant enter the front door carrying a brown bag; he marveled that "[t]his guy is here again," but simply kept working. A few moments later, when his back was toward the store entrance, Bautista heard a noise indicating something had hit the meat counter. When he turned around he saw appellant leave the store, mount a bicycle and ride off. Customers told him appellant had thrown the bag at the meat counter. Bautista saw that the bag had burst and the liquid contents splattered on meat that had been placed on the counter and spices on a nearby display. The substance smelled like paint thinner and some of the material in the liquid looked to him like dog feces. Bautista called Tom Davis, the manager of the market, and put cones around the splattered substance to keep customers away from it.

After being alerted to the situation by Bautista, Davis went to the front of the store and saw that the contents of the bag had splattered on the meat counter, floor, all over the spice racks, and all over the window. Davis described the splattered substance as "a red liquid with some feces right in the middle of it." When he described the chemical smell to the police dispatcher, she told him to call the fire department because it "could be toxic," and he did so. When firefighters arrived they evacuated the entire market, resulting in lost revenue. As directed by the fire department, the market hired a toxic materials removal company to dispose of the noxious substance and feces and the affected meats and spices, at a cost of nearly $5,000, not counting the lost revenue resulting from early closure of the market.

After the police and fire department arrived, Bautista was shown photographs of possible suspects and identified one of them as the person he had seen the previous day shoplifting and fighting with employees, and again on the present day holding the brown bag and then running out of the store and riding away on his bicycle after the bag was thrown at the meat counter. In court, Bautista identified that person as appellant.

Michael St. John, deputy commander of the Marin County HAZMAT team and chief of the Mill Valley Fire Department, was dispatched to the scene of the incident. He testified that after smelling the chemical odor of the splattered substance he ordered his team to wear encapsulated chemical suits with respiratory protection before entering the market. St. John testified that a sample of the liquid portion of the substance analyzed by a "HAZMAT ID" machine[3] revealed that, in addition to water and fecal matter, it contained the following chemical compounds: Astromid 18, which is "used to mix other types of chemicals," chloroacetaldehyde solution, also utilized to mix other chemical compounds, and isopropyl rubbing alcohols of various types. Based on the analysis of the HAZMAT detector and his own experience and observations, it was St. John's "professional opinion," that the chemicals and fecal matter contained in the substance contaminated the spices, meat, and other food that were exposed to it, so that they would "not be consumable anymore," and the substance "would definitely present an inhalation hazard" to unprotected persons in the market.

Appellant, who did not himself testify, presented two witnesses.

Jeffrey Houghson, a licensed security guard, lives in Novato about three miles from the Harvest Market, does "a lot of work on computers and radios," and one of his primary interests is HAM radio. Houghson never broadcasts on the radio but has a scanner and likes to listen to police dispatches. He keeps the scanner turned on virtually "all the time" when he is awake, takes it with him when he is at work, and has a "a setup" in his vehicle that permits him to monitor police calls while driving. Houghson said he was listening to the scanner at home on October 25, between 1:00 or 1:30 until he left the house at approximately 5:50 or 6:00 p.m. "[A]round 5:20," Houghson "heard a transmission go out stating that there was a suspicious circumstance call pending at

[3] According to St. John, the machine, which costs in the range of $70,000 to $80,000, "shoots a beam of light into the material and gives you a list of the compounds that are present in the material and then breaks it down."

Harvest Market. That caught my attention because I shop there and I'm familiar with the people there and stuff."

Asked whether anyone was with him in his home at the time he first heard that transmission, he answered "Matt Chamberlin and Charles Nishi" and said Nishi had been there "approximately 15 to 20 minutes." In other words, Houghton testified, appellant had been in his house since about 5:00 p.m. On cross-examination, Houghton acknowledged that he was not taking notes about the time of day and did not look at his watch or the clock on the wall to determine what exact time appellant arrived and left his house. Houghton stated that appellant was more an "acquaintance" than a friend, and he had known him for about eight months but didn't know much about him. He knew appellant only because he sometimes visited his roommate.

Noting that Houghton knew from the police transmission that the offense took place shortly before 5:20, when appellant was at his house, and knew appellant was arrested for the offense the next day, the prosecutor asked Houghton why he did not go to the police and tell them appellant could not have committed the offense, because he was at Houghton's house at the time of the offense. Houghton answered: "I just did not want to get laughed at. It seems like—you don't go down to the police department to argue the case. If you do, they tell you to go away or you get arrested."

Matthew Chamberlin, who had lived in the house in which Houghton rented a room, had known appellant for "about 30 years." Chamberlin said he arrived at the house on October 25 at 5:00 and saw appellant "sitting on the porch waiting for me." On cross-examination Chamberlin testified that he "knew" appellant came to his house at 5:00 because "they called [the time] out on the radio" Houghton had switched on. Chamberlin acknowledged "I don't know times for sure on any given day," and agreed with the prosecutor that he was testifying "to help your friend because the time is important, right?" Asked by the prosecutor "why didn't you go to the police department and tell them that your friend, who is now in jail, was not the one who committed the crime because he was at your house?" Chamberlin answered: "Oh, dealing with the courts and

the police and all that, I have an aversion to that for personal reasons. I was in a murder trial with my father, and it just freaks me the heck out, the whole thing."

## DISCUSSION

### *The Conviction of Depositing a Hazardous Substance is Supported by Substantial Evidence*

Appellant states his substantial evidence claim as follows in his opening brief: "The People did not produce any evidence that the substance [thrown at the meat counter] was statutorily classified as hazardous either under the Labor Code, the Health and Safety Code, or Federal Regulations regarding radioactive material. Indeed, in light of St. John's testimony that the substance was mainly water mixed with rubbing alcohol and common compounds used to mix other chemicals, it is unlikely that the substance would qualify as 'hazardous' under any of the statutory classifications. [¶] Nor was there any evidence that the substance posed a 'significant' health or environmental hazard. The store was evacuated and the HAZMAT team called in as a precaution. The HAZMAT team did not even complete the five-step process in identifying the substance because the initial read out told them that this was basically water and rubbing alcohol. Although the store remained closed until the next morning, employees were allowed back in later that same evening 'once [the HAZMAT team] figured out it wasn't dangerous.' Witnesses testified to an offensive odor, that 'smelled like paint thinner' and was strong at the site where the bag was thrown, [but] there was no evidence that odor remained after the mess was cleaned up."

Appellant's argument—which embodies a legal, as well as a substantial evidence claim—is untenable.

The elements of the offense of depositing a hazardous substance are described in section 374.8, which defines "hazardous substance" generally as "[a]ny material that, because of its quantity, concentration, or physical or chemical characteristics poses a significant present or potential hazard to human health and safety or to the environment if released into the environment, including, but not limited to, hazardous waste and any material that the administrator or handler, as defined in Chapter 6.91 (commencing with

Section 25410) of Division 20 of the Health and Safety Code, has a reasonable basis for believing would be injurious to the health and safety of persons or harmful to the environment if released into the environment."[4] (§ 374.8, subd. (c)(1).)

Although section 374.8, subdivision (a) states that "proof of the elements of the offense shall not be *dependent* upon the requirements of Title 22 of the California Code of Regulations" (italics added), which identifies and lists hazardous materials (Cal. Code Regs, tit. 22, § 66261.3), title 22 *does* identify isopropyl alcohol (which appellant dismisses as merely "rubbing alcohol") and chloroacetaldehyde as hazardous materials, and the latter chemical may be "an extremely hazardous waste." (Cal. Code Regs., tit. 22, appen. X, ch. 1l, pp. 4, 9.)

In any event, Michael St. John, deputy commander of the Marin County HAZMAT team, essentially testified that based on his training and experience the combination of biological matter (feces), isopropyl alcohol, and chloroacetaldehyde constitutes a "hazardous substance" and that he believed dumping or depositing it in the premises of the Harvest Market "would be injurious to the health and safety of persons or harmful to the environment" (§ 374.8, subd. (c)(1)); and that testimony was undisputed. Appellant now maintains that "St. John's opinion that the substance was 'hazardous' was beyond his expertise" because "[a]lthough he had training in how to use the HAZMAT machine, there was no evidence that he was familiar with the standards for designating a substance as hazardous."

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[4] The statute states that a "hazardous substance" also means (1) any substance or chemical product for which "the manufacturer or producer is required to prepare a material safety data sheet, as defined in Labor Code section 6374, pursuant to the Hazardous Substances Information Training Act (Labor Code, §§ 6360 et seq); or any applicable federal law or regulation; or (2) the substance is described as a radioactive material in the regulations promulgated by the Nuclear Regulatory Commission; or (3) the substance is designated by the Secretary of Transportation in Chapter 27 of the appendix to title 19 of the United States Code and taxed as a radioactive substance or material; or (4) the materials are listed in subdivision (b) of Labor Code section 6382. (Pen. Code, § 374.8 subds. (c)(2)(A)-(D).)

Putting aside the questionable merits of this argument, it may not be advanced here because St. John's expertise was never questioned below. "New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal." (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 13, fn. 6, citing Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 8.231, p. 8-113.)

Moreover, section 374.8 does not limit hazardous waste or materials to substances specifically labelled as such by a statute or regulation; it includes "[*a*]*ny* material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health or safety or to the environment if released into the environment . . . ." (§ 374.8, subd. (c)(1), italics added.)

Further, the statute provides that waste or other material may be considered hazardous if "a handler"—as defined in specified provisions of the Health and Safety Code—"has a reasonable basis for believing [it] would be injurious to the health and safety of persons or harmful to the environment if released to the environment." (§ 374.8 subd. (c)(1).) Because St. John is engaged in the processing of potentially hazardous materials by means of a HAZMAT detector he is a "handler" within the meaning of one of the provisions of the Health and Safety Code specified in Penal Code section 374.8, which defines "handle" to mean (among other things) to "process . . . or dispose of a hazardous material in any fashion." (Health & Saf. Code, § 25411, subd. (b).)

Accordingly, St. John's undisputed testimony unquestionably provides substantial evidence in support of appellant's conviction of depositing hazardous waste or material.

***Section 654 Precludes the Consecutive Sentences Imposed on Appellant for Vandalism and Depositing a Hazardous Sentence***

The trial court found section 654 inapplicable in this case because, as it stated at the sentencing hearing, "Count 1 was vandalism. Count 2 was a conviction for disposing or dumping a hazardous substance. That necessarily contemplates different types of conduct. You damaged property in count 1, but with respect to count 2, you took what was a noxious, hazardous substance, and you disposed and dumped it in a retail facility, that of a grocery store. . . . So, as a result, I find that the same factors, pursuant to

California Rule of Court section 4.421 [relating to circumstances in aggravation], apply as to count 2. Penal Code section 654 does not. Separate elements are required for count 2 which are not required for count 1. Therefore, pursuant to section 1170.1, one-third of the midterm will be imposed [on] that aggravated sentence. As to count 3, the misdemeanor depositing of an offensive substance, pursuant to . . . section 375, subsection (a), that misdemeanor I believe is subject to . . . section 654. You will not receive an additional sanction for that offense."

The court's determination that counts 1 and 2 involve different elements was irrelevant to the application of section 654, and the inquiry the court should instead have made was never undertaken.

The application of section 654, which precludes multiple punishment for indivisible acts, depends not on the difference between the elements of the offenses but on the intent and objective of the actor. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) If all of the offenses being considered were merely different means of carrying out a single objective, the defendant may be found to have harbored a single intent and in that case may be punished only once. (*Ibid*., accord, *People v. Spirlin* (2000) 81 Cal.App.4th 119, 129.) It is only where the defendant had "multiple or simultaneous *objectives*, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each *objective* even though the violations share common acts or were parts of an otherwise indivisible course of conduct." (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267–268, italics added.) Appellant clearly did not seek to satisfy multiple objectives.

Pointing to *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264 (which held that section 654 precluded punishment for both vandalism and arson where the defendant's single objective was to burn down the victim's house), the Attorney General concedes that appellant's conviction for depositing a hazardous substance should be stayed pursuant to section 654 because, as the trial court failed to consider, the prosecution produced no evidence appellant harbored more than one objective and multiple punishment was therefore precluded. The Attorney General's concession is warranted.

The eight-month consecutive sentence imposed on appellant for depositing a hazardous substance must be stayed.

***The Abstract of Judgment Must be Amended to Enable the Trial Court to Specify the Statutory Bases for the $500 Fine and $25 Penalty Assessment***

At the sentencing hearing, the court ordered appellant "to pay a fine of $500 that I find is appropriate based on your actions in this case." After stating that a parole revocation restitution fine "will be imposed and stayed pending successful completion of your parole," the court also announced that, "with respect to your three convictions, you're assessed a $120 court operations assessment and $90 in criminal conviction fees, and a $25 administrative screening fee."[5] Appellant claims the court specified no basis for the $500 fine and $25 assessment. Though the court stated the $25 fee was for "administrative screening," the abstract of judgment combines the $25 and $500 assessments and describes the result as a $525 "fine." The minute order also fails to specify the bases for these two assessments

The Attorney General agrees that the abstract of judgment must be amended to specify the statutory or other bases for the $525 sanction. As he correctly points out, a trial court pronounces judgment "by imposing a specific fine and generally referring to the applicable penalty assessments." (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1373.) However, if the court makes a general pronouncement, "[t]he responsibility then falls to the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment." (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864.) This includes providing a "statutory basis for each penalty assessment . . . ." (*People v. Hamed, supra,* 221 Cal.App.4th at pp. 940–941.)

The Attorney General assumes, as we do, that the $25 assessment is likely the mandatory fee for a presentence investigation report under section 1203.1b, subdivisions (a) and (h) and the $500 fine is likely imposed under section 594, subdivision (b)(1),

[5] The abstract of judgment specifies that the $120 and $90 assessments were based, respectively, on Penal Code section 1465.8 and Government Code section 70373.

which defines the penalty for vandalism. However, neither the reporter's transcript nor the minute order confirms this assumption. We believe the trial court is in a better position than we are to amplify the abstract of judgment by specifying the statutory authority for imposition of the "$525 fine." "[W]here, as here, the Attorney General identifies an evident discrepancy between the abstract of judgment and the judgment that the reporter's transcript and the trial court's minute order reflect, the appellate court itself should order the trial court to correct the abstract of judgment." (*People v. Mitchell* (2001) 26 Cal.4th 181, 188.)

**DISPOSITION**

For the foregoing reasons, the consecutive sentence imposed on appellant for depositing hazardous material in violation of section 374.8 is stayed.

In all other respects, the judgment is affirmed and the matter is remanded to the superior court with directions to order the clerk to amend the abstract of judgment by specifying the bases for the $500 and $25 assessments imposed on appellant.[6]

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[6] Another matter may also deserve the court's attention. After imposing the $525 fine, the court observed that based on its calculations appellant had accumulated 673 days of credit for actual custody and 672 good time/work credit, for a total credit of 1,345 days. However, as the court realized, appellant had been sentenced to three years and eight months, which the court calculated to be 1,335 days. Acknowledging appellant had been confined 10 days longer than the term to which he had been sentenced, the court determined that the "additional days in custody will be applied towards fines and fees at the rate of $125 per day. That would provide you with $1,250 credit towards the $500 fine . . . plus any related fees; so what I find is that you will not be required to pay any fees or fines [and you] do not have to serve any additional time in custody."

The court's remedy appears to be based on recent amendments to section 2900.5, which now allows that where, as in this case, the number of days served in custody exceeds the number of days to which the defendant was sentenced, the excessive confinement may be applied to base fines at the rate of not less than $125 a day. Paragraph 16 of the abstract of judgment (which is embodied in a Judicial Council form last revised in 2012) pertains to credit for time served, requiring the court to check boxes specifying which of three statutes—sections 2933, 2933.1, and 4019—the court relied upon in granting credits for time served. None of the three statutes listed in the form explicitly refer to a situation in which the credits relate to the fact that the time the defendant spent in custody exceeded the term prescribed by his sentence, as does section

2900.5. Nor has the trial court referred to section 2900.5 in completing paragraph 13 ("other orders") although it does note this is a "paper commitment" and that "defendant is time served at sentencing. Fines and fees deemed satisfied with credit for time served." Neither the reporter's transcript nor the minutes indicate whether the court relied on section in whole or in part. If, as appears, the court relied on section 2900.5 it should say so.

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Kline, P.J.

We concur:

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Stewart, J.

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Miller, J.

*People v. Nishi* (A154480)